IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No. 983 of 2005
in
Notice of Motion No.842 of 2002
in
Suit No.436 of 2000

Mr Ravindra Kumar Agarwal...Appellant

vs

Mr Ashok Kumar Agarwal ando rs..Respondents

Mr.A.A.Bookwala with Mr N Engineer i/b Desai & Diwanji for appellant

Mr. Snehal Shah with Ms G Iyer i/b D.S.K.Legal for respondents.

CORAM:F.I.REBELLO & D.Y.CHANDRACHUD JJ.

Dated 26.l0.2005

ORAL JUDGEMENT (Per Rebello J.)

l. The appellant herein is the original defendant no.l. The respondent no.l is original plaintiff. The plaintiff has filed a suit against the original defendant no.l and other defendants for partition of immovable property situated at Jolly Maker I Premises Cuffe Parade, Mumbai. It is the case of the plaintiff that the said properties are part of the assets and properties of Sardarilal K Agarwal HUF. The suit is for partition of the assets and properties of Sardarilal K Agarwal. The shares of the plaintiff and defendants have been set out. A

motion was taken out by the plaintiff being Notice of Motion No.842 of 2002. The relief by way of interim relief which was sought was to restrain the defendants from in any manner dealing with, disposing of, alienating, encumbering or parting with possession or creating any rights of HUF property more particularly described in Exhibit F to the plaint. Prayer (a) was for appointment of the Receiver with all powers including to take charge of all assets, discharge liabilities,if any, and distribute the net assets among defendant nos l to 4, defendant nos. 5 to 8, defendant nos. 9 to l2, plaintiff and defendant nos.l7 and l4 and other defendants as set out therein.

2. In a Chamber Summons taken out on 3.9.200l the learned Judge was pleased to record a statement made on behalf of the defendants that his clients had no intention to part with possession or creating third party interest in respect of the flat. The Chamber Summons was disposed of by order dated 26.2.2002 and the statement made on behalf of the defendants on 3.9.200l was continued for a further period of four weeks. From the record it appears that on 27.3.2002 in the notice of motion on behalf of the defendant no.l a statement was

made by the learned Counsel that his clients had no intention to part with possession or creating any third party interest in the suit flat. The motion came up for hearing on l6.9.2005. Before the learned Judge relief by way of appointment of Court Receiver and injunction was pressed only in respect of the flat at Jolly Maker Apartments, Colaba. The flat was in possession of the defendant no.l. The Court noted the defence of the defendant no.l as set out in reply dated l7.9.2002 that the flat had come to his share under an oral family arrangement.The learned Judge reproduced the said para and set out that a sum of Rs.5.6 lacs received from the society was advanced as interest free deposit to the members towards upkeep and maintenance of the premises and the same had been extended towards the maintenance of the flat. The learned Judge held that at the ad-interim stage it was not possible to accept the case of oral family arrangement as made out on behalf of the defendant no.l and that the flat was in the name of the father before he expired on l2.3.l996. The learned Judge thereafter after noting the arguments and judgements cited, held that it is necessary that the property is protected and income generated for HUF, for the use, occupation and possession of the

said flat by defendant no.l. The Receiver of this Court was accordingly appointed Receiver of the flat bearing No.ll2A Jolly Maker Apartments I Premises Cooperative Housing Society. The Receiver was directed not to dispossess the defendant no.l but appoint defendant no.l as agent without security or payment of royalty. It is this order which is the subject matter of the present appeal. It may be necessary to reproduce the exact portion of the order whereby the Receiver was appointed, which reads as under:

> " I am of the opinions that appointment of court receiver is undoubtedly based on principles set out under Order 40 rule l of CPC. Court Receiver can be appointed on the ground of just and convenience and also in a case of an imminent danger or the waste of the property".

3. On behalf of the appellant, learned counsel submits that the learned Judge while disposing of the appeal has not considered the ratio of two judgements which were placed for consideration. It is submitted that the property was not "in medio" but in possession of the defendant no.l. There was

no material produced by the plaintiff or any other defendants that there was danger to the property or likelihood of the property being wasted. The effect of appointment of the court receiver, it is submitted is dispossessing the party in possession and vesting of property in the court. A civil court normally does so when the property is in medio or there is likelihood of danger or waste of the property. In the instant case at the highest the plaintiff would be entitled to the share if he succeeds in the suit. As that be the case the plaintiff can always be secured from the share which according to the plaintiff himself,defendant no.l is entitled to.

4. On the other hand, on behalf of the respondents, the learned counsel points out that this court should not interfere in the exercise of discretion by the learned single Judge. It is further submitted that defendant no.l was receiving moneys and appropriating the same. The property is a dilapidated property being occupied by the defendant no.l without the HUF estate receiving adequate compensation for the occupation of the premises by the defendant no.l. In the circumstances it is submitted that the learned

Judge properly exercised discretion and this court ought not to interfere with the order. Reliance is placed in the judgement in the case of division bench of the Patna High Court in Kamal Chaudhary and anr vs. Rajendra Chaudhary and ors, AIR l976 Patna 366 and judgment of the Apex Court in Maharaj Jagat Singh vs Lt Col Sawai Bhawani Singh and ors, AIR l993 SC l72l.

5. Attention of the learned Judge was invited on behalf of the defendant no.l to the case of Govind Narayanrao Desai vs Vallabhrao Narayanrao Desai, 22 BLR 2l7. In that case the suit filed was a suit for partition between the brothers. The defendant was in possession of the family property. The plaintiff sought partition. The receiver came to be appointed against which an appeal was preferred. While hearing the appeal the division bench of this court observed as under:

> "Now, generally speaking in a partition suit between members of a joint family the Court will not appoint a Receiver except by consent, and specially where the family property consist of land. So in order that a Receiver should be appointed of joint

> family property in a partition suit special circumstances will have to be proved before the Court will be entitled to appoint a Receiver. Generally speaking when an application is made to the Court to take the property into its hands by appointing a Receiver, the plaintiff must prove that prima facie he has a very excellent chance of succeeding in establishing the case made out in his plaint and in the next place he must satisfy ;the court that the property in possession of the opposite party is in danger of being wasted".

This was the principle which the division bench of this court had enunciated and which is the ratio of that judgement.

6. In T Krishnaswamy Chetty vs C Thangavelu Chetty and ors, AIR l955 Madras 430 is the classic authority on the law pertaining to appointment of receiver, Ramaswami J. has set out the following principles for appointmentof a Receiver. Various cases and treaties on the issue of appointment of Receiver were considered. They can be summed up as under:

l) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute, it is a sound and judicial discretion, taking into account all the circumstances of the case,exercised for the purpose of permitting the ends of justice and protecting the rights of all parties interested in the controversy and the subject matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired object of the judicial proceeding;

2) The court should not appoint a receiver,except upon proof by the plaintiff that prima facie, he has very excellent chance of succeeding in the suit;

3) Not only must the plaintiff show a case or adverse and conflicting claims to property,but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of

danger is an important consideration. A court will not act on possible danger only, the danger must be great and imminent demanding immediate relief.It has been truly said that a court will never appoint a receiver merely on the ground that it will do no harm.

4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a ‘de facto’ possession since that might cause irreparable wrong. If the dispute is as to title only, the court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be ‘in medio’ that is to say, in the enjoyment of no one, as the court can hardly do wrong in taking possession, it will then be the common interest of all the parties that the court should prevent a scramble as no one seems to be in actual lawful enjoyment of the

property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a court with jurisdiction to appoint a receiver.

5) The court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to court with clean hands and should not have disentitled himself to the equitable relief by laches, delay,acquiescence etc."

7. Before dealing with the issue we may consider the judgement relied upon on behalf of the defendant no.l. Reliance is placed in the case of Kamal Chaudhary and another (supra). That was a case where in a suit for partition a Receiver was appointed though no case of waste or mismanagement was established. In that case the court noted that the plaintiff no.l, the eldest son ought to have

been karta, but the allegation was that defendant nos. 2 and 3 therein had taken control over the joint family properties. The court noted that except for defendant no. 3 the other defendants had not filed rejoinder to the application filed by the plaintiff for appointment of the Receiver. Before the court in appeal also the other defendants had not objected to the appointment of the Receiver. The court further held that no substantial prejudice would be caused to the appellant and in the circumstances appointed the Receiver.

8. In the case of Maharaj Jagat Singh (supra) the issue again was appointment of a Receiver. In that case for consideration was whether the private properties of Maharaja Man Singh belonged to Hindu undivided family of Maharaja Man Singh or his personal properties. The issue was whether the respondent is entitled to succeed to the properties of Maharaja Man Singh. Considering the material the court at the prima facie stage held that the properties belonged to HUF and in the circumstances respondent no.l had only l/6th share in the properties. It was then held that though there was an order of injunction the respondent no.l had

disposed of several immovable properties included in the schedule. It is in those circumstances and to avoid allegation being made against the respondent no.l for contempt of court and breach of injunction, the court appointed the Receiver who would effectively safeguard the properties.

9. Order 40 rule l of the Code of Civil Procedure empowers a court to appoint Receiver when it appears to the court to be just and convenient. The issue therefore would be whether in a case of partition of properties prima facie belonging to HUF
Receiver ought to be appointed by dispossessing the party in possession. A learned Division Bench of this court, after considering various aspects as to the appointment of the Receiver observed that normally unless special circumstances are indicated, Receiver ought not to be appointed. Further that apart from showing prima facie case the party must also establish that the property in possession of the opposite party is in danger of being wasted. The question therefore before us is whether there was any material before the learned Judge to come to the conclusion that there was any danger of the property being wasted and/or as set

out by the learned Division Bench in Govind N Desai (supra),, whether there was any special circumstances. From the impugned order we find the learned Judge failed to address himself to those issues. The learned Judge proceeded on the footing that the material produced by the defendant no.l, prima facie could not be considered at the ad-interim stage and in those circumstances the property was required to be protected and income had to be generated and consequently appointed the Receiver. In our respectful opinion, this would be contrary to the law laid down by the Division Bench of this court which mandated that there ought to be special circumstances and apart from that a case of danger of waste had to be made out before Receiver could be appointed apart from showing strong prima facie case to title. The principles set out by Ramaswami J. in the case of T Krishnaswamy Chetty (supra) in our opinion are the basic principles which all courts must consider in the appointment of Receiver. We have no hesitation in adopting the principle laid down in the case of T.Krishnaswamy Chetty (supra). Once that be the case, as the property was already protected by an injunction order there was no case of waste or damage established nor special circumstances. The

only grievance was that the defendant no.l had received some moneys which he had not accounted for. On behalf of the defendant no.l the learned counsel makes a statement that they will keep account of the amounts already received and in the event any moneys are received in future the same will be deposited before this court.

. There is no material of the property being in danger or being wasted. The defendant no.l has been in possession of the property for last several years. Even if his defence is rejected, defendant no.l. admittedly has l/6th share in the property. If the plaintiff establishes his right and the defendant no.l has to pay for the occupation of the premises, the same can be adjusted from the share of the defendant no.l.

l0. In these circumstances the impugned order of the learned single Judge will have to be interfered with and the appeal allowed. The order dated l6.9.2005 is therefore set aside. The appellant-defendant no.l,however, is directed not to alienate, alter,transfer or create any third party interest or part with possession in respect of the suit flat. The appellant- defendant no.l in the

event any further moneys are received from the society to deposit the same in this court within eight weeks of receipt and also to file account of the moneys directly received and spent,if not already filed,within eight weeks from today. On the facts and circumstances of the case there shall be no order as to costs.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No.983 of 2005

Date of Judgment: 26th October 2005

For approval and signature of:

The Hon’ble Mr.F.I.REBELLO J.

The Hon’ble Dr D.Y.CHANDRACHUD J.

1. Whether the Reporters of the local papers may be allowed to see the judgment/order?
2. Whether to be referred to the Reporters or not?
3. Whether Their Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judges?
6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur

Aurangabad and Goa offices?